IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 20, 2007 Session

STATE OF TENNESSEE v. STACY N. MOONEYHAN

Appeal from the Criminal Court for Sumner County
No. 896-2004 Jane Wheatcraft, Judge

No. M2006-01330-CCA-R3-CD - Filed October 30, 2007

The defendant, Stacy N. Mooneyhan, appeals from his convictions of rape of a child, a Class A felony; incest, a Class C felony; aggravated sexual battery, a Class B felony; and two counts of especially aggravated sexual exploitation of a minor, Class B felonies. The defendant, a Range I offender, was sentenced to twenty-three years for rape of a child, four years for incest, ten years for aggravated sexual battery, and twelve years for each of the especially aggravated sexual exploitation of a minor convictions. Some of the sentences were imposed consecutively, for an effective sentence of thirty-five years in the Department of Correction. In this appeal, the defendant claims (1) that the evidence does not support his convictions, (2) that the trial court erred in denying his motion to suppress evidence, (3) that the trial court erred in excluding evidence of a prior false allegation of sexual abuse the victim made against her mother's boyfriend, (4) that the trial court erred in excluding evidence of the victim's mental health issues, treatment, and medication, (5) that the trial court erred in admitting rebuttal evidence consisting of graphic photographs of male genitalia and in allowing a state's witness to connect the defendant to the photographs, and (6) that he received excessive sentences. We affirm the defendant's convictions but remand for resentencing because of irregularities in the sentencing process.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part, Reversed in Part, Case Remanded for Resentencing

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. MCLIN, JJ., joined.

Walter H. Stubbs, Gallatin, Tennessee, for the appellant, Stacy N. Mooneyhan.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and C. Ronald Blanton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At trial, the victim testified that she was fourteen years old and a freshman in high school. She said the defendant was her biological father, a fact which was also the subject of a stipulation by the parties. She said that in the winter months of 2003 and 2004 she lived with the defendant, her stepmother, and her three brothers. She said she was twelve years old at that time. She said she fought with her stepmother frequently and was not close to her father and preferred to live with her biological mother. She said that on one occasion during this time period, she was taking a bath and her father came into the bathroom. She said she asked him to hand her a towel, but he did not. She said that instead, he told her to get out of the bathtub and get onto the floor. She said he touched her breasts and "private parts," penetrated her vagina with his penis, and took photographs of her and of the penetration. She said that she complained that the penetration hurt but that the defendant told her it would be over soon. The victim identified two photographs as those taken by the defendant. She said the defendant gave her various explanations for his actions. He told her that it was punishment, that it was because he was her father, and that it was because she looked like her mother.

The victim testified that she did not like living with her father, that she had wanted for eight or nine years to be allowed to live with her mother, and that after the sexual abuse allegations came to light, she was allowed to live with her mother. She acknowledged that about twelve days before making the allegations against her father, she had been upset with him because she wanted to see her mother on Mother's Day and "threw a fit" and accused her father of lying to her because he had promised to take her to see her mother. She said she was eventually allowed to see her mother that day. She denied that when she went to see her mother, she had taken the camera that the defendant used to take the explicit photographs. She acknowledged that she had taken the camera to school on one occasion and had taken a photograph of her friends.

Lisa Dupree testified that she was employed as a social worker at Our Kids Clinic. She said the victim was evaluated at the clinic. She said the physical genital examination did not reveal any injury. She said that a finding of no injury was common and that there are positive findings in only seven percent of evaluations performed as a result of sexual abuse allegations.

Detective Donald Hardin of the Portland Police Department testified that he, along with his supervisor, Lieutenant Stan Jones, and Milindy Kellery, a case worker with Children's Protective Services, interviewed the victim at her school on May 21, 2004. He said he interviewed the victim in more detail later that day at the police department. He said that after these interviews, the authorities obtained a search warrant for the defendant's home. He said they were looking for a silver and black camera, which he anticipated would contain "photos of the rape." He said that in executing the warrant at the home, he observed a padlock and hasp on the bedroom door. He said he recovered the camera that had been described by the victim, took it to a drug store, had the store owner remove the film, and had photographs developed. He identified the photographs that had been received as exhibits during the victim's testimony as being from the photographs he had developed.

He said there were also photographs from the roll of film which depicted a baby and the defendant's wife's place of employment.

Detective Hardin testified that he interviewed the defendant on June 3, 2004. He said the defendant came to the police department voluntarily for the interview. A video recording was made of the interview, and portions of it were played for the jury. In the video interview, the defendant was shown a photograph from the film taken from his home. He acknowledged that the boxer shorts depicted in the photograph were his, but he denied that he was the person wearing them. He said he could not tell whether the other person in the photograph was his daughter. The defendant denied taking inappropriate photographs of the victim. He likewise denied any sexual activity with the victim. The defendant said he kept the bedroom door locked because of "her mother," which Detective Hardin thought referred to the defendant's mother-in-law.

Kathy Gregory testified for the defendant. She said she was the defendant's mother-in-law. She said that during the winter of 2003 and 2004 through May 2004, she regularly babysat the victim and the other children in the Mooneyhan home. She said that during this time period, she and the defendant's mother, Pat Mooneyhan, alternated weeks babysitting the children. She said she would stay at the house for a week at a time and that she was there "[m]ost of the time." She said she never saw a padlock on the defendant's and his wife's bedroom door. She said that the door was sometimes locked to keep the baby from crawling into the room but that the victim had access to the room when she put away laundered clothes. She said she never observed anything improper about the defendant's relationship with the victim. Ms. Gregory recalled that the victim and her father had a disagreement over the defendant's camera on Mother's Day 2004. She said that the victim insisted she was going to take the camera to her mother's house and demanded film for the camera. She said the defendant told the victim he did not have money for it and would need to wait until his wife got home. She said this made the victim mad.

Ms. Gregory testified that she was at the home when the police arrived on May 21. She denied that the defendant called the home and asked her to retrieve a camera from his bedroom.

Patricia Mooneyhan, the defendant's mother and the victim's grandmother, testified that she lived near the defendant's home and that she babysat the victim "and her brothers" after school in her home on alternating weeks. She said the victim spent the night with her on alternating Saturday nights, as well. She said she never observed anything inappropriate between the victim and the defendant, nor did she observe any fear on the victim's part toward the defendant. She said the victim talked constantly about her desire to be with her mother and that the victim had been very upset after a Mother's Day program at church in the days preceding the victim's allegations against the defendant. She said there had been an incident the previous winter in which one of the victim's friends alleged that a teacher had engaged in inappropriate conduct with the victim's friend. She said the victim related this information to her but did not make any allegation about the defendant's conduct.

The state recalled Detective Hardin during its rebuttal proof. He testified that he was familiar with the victim's mother's appearance, that he had reviewed all of the photographs from the film that had been in the defendant's camera, and that the victim's mother did not appear in any of those photographs. He identified an "index photo proof" of all of the photographs on the film. He said that the index proof depicted, in sequential order, a photograph of a baby, the two photographs which had been identified during the state's case-in-chief as the victim's genitalia and the victim and the defendant engaged in penile-vagina intercourse, six photographs of a penis after some unexposed frames, and photographs from Cindy Mooneyhan's place of employment. The index proof was received as an exhibit. The exhibit reflects an additional baby photograph before the workplace photographs and an explicit photograph of female genitalia following the workplace photographs.

Lieutenant Joseph Stanley Jones of the Portland Police Department testified that he and Officer Larry Jones secured the defendant's home before the search warrant arrived. He said there was a padlock on the bedroom door, which either the defendant or his wife unlocked when they arrived at the home. He said that he had a conversation with Ms. Gregory before the defendant arrived at the home and that Ms. Gregory told him the defendant had called her and asked that she remove a camera from the locked bedroom. He said he was unaware of any photographs that had been taken of the padlock.

The jury found the defendant guilty of rape of a child, incest, aggravated sexual battery, and two counts of especially aggravated sexual exploitation of a minor. The court imposed an effective thirty-five year sentence.

I

The defendant challenges the sufficiency of the convicting evidence. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The defendant does not challenge the proof of any of the specific elements of his convictions of rape of a child, incest, aggravated sexual battery, and especially aggravated sexual exploitation of a minor. Rather, he claims that the victim was an incredible witness because she had previously made false allegations of sexual abuse, had been removed from her mother's custody as a result of these allegations, since that time had expressed an intense desire to return to her mother's custody, and had, in fact, been returned to her mother since making allegations against the defendant. He also argues that there was no medical evidence of a rape or sexual assault. We note, first, that the trial

court excluded any evidence of any previous false allegations. Because that evidence was not before the jury, it is beyond our purview in reviewing the sufficiency of the evidence. Based upon the evidence before it, the jury accredited the victim's testimony. That testimony included her descriptions of the defendant's physical assaults, as well as her identification of herself and the defendant in a photograph depicting vaginal/penile intercourse and her identification of herself in a photograph which included the female subject's genital area. Likewise, the jury obviously accredited the medical proof that negative physical findings were not inconsistent with sexual abuse having occurred. Issues of witness credibility and the proper weighing of evidence are within the province of the trier of fact and are beyond our review on appeal where, as here, there is evidence to support the jury's findings. Thus, the defendant is not entitled to relief.

II

The defendant contends the trial court erred in denying his motion to suppress evidence obtained pursuant to the warrantless entry into and seizure of his residence before the authorities had obtained a search warrant for the property. He claims that exigent circumstances did not attend the police action. The state argues that the police had consent for the initial warrantless entry of the defendant's home. Alternatively, the state argues that the police had probable cause to enter the home and that exigent circumstances required the brief securing of the home before the warrant arrived in order to prevent the destruction of evidence of the crimes.

The defendant filed a pretrial motion to suppress, and the trial court conducted a hearing. The state did not dispute that after the victim was interviewed, two police officers went to the defendant's house without a warrant, and that the house was secured under police authority until a warrant was obtained.

Detective Hardin testified that during his interview of the victim, he learned that a camera used to photograph the victim was located in the defendant's padlocked bedroom. He said the victim described the home, including the location within the bedroom of the camera and the material of the bathroom floor where the rape took place. He said the victim feared retaliation from the defendant. He said he believed it was necessary to corroborate the victim's claim before obtaining a warrant, and because she claimed she had called 9-1-1 approximately two weeks earlier about an attempted rape, he obtained and listened to the tape of the call. He then prepared the search warrant. He acknowledged that Lieutenant Jones and another officer went to secure the residence while he was obtaining the warrant and that he obtained information about Jones' observations of the type of bathroom flooring and the padlocked bedroom, and included that information in the affidavit for the warrant. He said he had also received this information from the victim.

Detective Hardin testified that he went to the victim's school to interview her at approximately 2:00 or 2:15 p.m., that he obtained a judge's signature on the warrant at 7:05, that he went straight to the defendant's house with the warrant, and that he served the warrant at 7:30 or 8:00.

Lieutenant Stan Jones testified that he, Detective Hardin, and Milindy Keller of the Department of Children's Services responded to the victim's school on May 21, 2004, in response to a sexual assault complaint. He said the victim described the type of flooring on the bathroom floor, the padlocked bedroom, and the camera. He said that he and Detective Hardin were concerned, based upon the victim's statement, that the defendant would destroy evidence of the crimes if he learned through the Department of Children's Services that an investigation was underway. He said the victim also feared further assault in retaliation for her having reported the crimes. He said he went with Officer Larry Jones to the defendant's home, where they encountered a woman who he believed was the defendant's mother-in-law, who said she was babysitting. He said he told the woman that some allegations had been made and that they needed to follow up on them. He said the woman told him that the defendant's wife was on her way home. He said the woman invited them inside. He said that the house was small and that he could see the bathroom floor and padlocked bedroom door down the hall. He said that the defendant's wife arrived and that he advised her they were in the process of obtaining a search warrant. He said that she said they could search without a warrant but that he told her they were getting a warrant. He said that during the wait, the defendant's mother-in-law received a cellular telephone call, that she told Lieutenant Jones the defendant wanted her to go into his bedroom to retrieve a camera, but that he did not allow her to do so. He said that the warrant eventually arrived and that the officers executed the search.

On cross-examination, Lieutenant Jones admitted that it may have been three or four hours that the home was secured pending arrival of the search warrant. He acknowledged that during this time, the individuals present were not allowed to leave and were not allowed to have unfettered access to the house. He denied that the authorities had taken any evidence from the house before the warrant arrived. He denied that the motivation for securing the defendant's home was a failed attempt to get the defendant to make incriminating admissions in a phone call with the victim that had been attempted earlier in the day.

Pat Mooneyhan testified at the suppression hearing for the defendant. She said she received a call from Kathy Gregory about 3:10 p.m. on May 21, 2004, in which Ms. Gregory informed her that the police were at the defendant's house and inquired about the defendant's and his wife's whereabouts. She said she went to the defendant's house at approximately 3:30. She claimed she saw Cindy Mooneyhan, who told her the police had her "gathering up tapes and movies." She said she was at the house for a little over an hour.

After receiving the evidence, the trial court found that the officers had probable cause to enter and secure the defendant's home after talking with the victim. The court stated, "[T]hat's all they did." The court found, "There was nothing taken out of the property, nothing displaced until the search warrant arrived there." The court found that although the search warrant affidavit included information about the home based upon Lieutenant Jones' observations, the majority of the information in the affidavit was developed from the victim's statements.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar guarantee is provided in Article 1, Section 7 of the Tennessee Constitution:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty.

The essence of these constitutional protections is "to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730 (1967)). Since an individual's expectation of privacy is nowhere higher than when in his or her own home, a "basic principle of Fourth Amendment law" is "that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980) (internal quotations omitted). Under the "fruit of the poisonous tree" doctrine, evidence that is obtained through exploitation of an unlawful search or seizure must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963).

The prohibition against warrantless searches and seizures is subject only to a few specifically established and well-defined exceptions. See Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); State v. Tyler, 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). The United States Supreme Court, holding that the constitution prohibits the warrantless entry into a suspect's home to make a felony arrest, has stated that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton, 445 U.S. at 590, 100 S. Ct. at 1382. Exigent circumstances exist "(1) when the officers [are] in hot pursuit of a fleeing suspect; (2) when the suspect represent[s] an immediate threat to the arresting officers or the public; and (3) when immediate police action [is] necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." Jones v. Lewis, 874 F.2d 1125, 1130 (6th Cir. 1989)). In addition, "law enforcement officers may also make a warrantless entry in an emergency to protect human life." State v. Robbie W. Fields, No. E2004-00716-CCA-R3-CD, Bradley County, slip op. at 6 (Tenn. Crim. App. Jan. 7, 2005).

On review, an appellate court may consider the evidence adduced at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. State v. Henning, 975 S.W.2d 290, 297-99 (Tenn. 1998). A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom,

928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The application of the law to the facts as determined by the trial court is a question of law which we review de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The defendant claims that the initial entry into the home was illegal. He argues that the state failed to establish that any exigency requiring the securing of the residence was not its own creation. He does not attack the validity of the search warrant itself, other than to argue that evidence obtained in its execution was tainted by the earlier entry. The defendant's argument related to the initial entry is flawed because it fails to account for the fact that the defendant's mother-in-law, who identified herself as babysitting for the defendant and his wife, invited Lieutenant Jones to come inside. The defendant's complaint about this entry is that Lieutenant Jones made his observations of the bathroom floor and padlocked bedroom while he was in the living room pursuant to Mrs. Gregory's invitation. The defendant has not challenged Mrs. Gregory's common or apparent authority to allow a law enforcement officer inside the home. See State v. Ellis, 89 S.W.3d 584, 593 (Tenn. Crim. App. 2000) (holding that person with common authority over premises who reasonably appears to have authority over the premises may give valid consent for search). Further, the defendant's argument fails to account for the fact that law enforcement already had the information about the type of bathroom flooring and the padlock before Lieutenant Jones arrived at the residence. Thus, we conclude that Lieutenant Jones' entry into the home was not constitutionally unreasonable.

Because the defendant argues that there were no exigent circumstances, we consider further whether the police properly secured the premises pending issuance and arrival of the search warrant. The United States Supreme Court has said that a warrantless seizure by restraining an individual from entering his home until a search warrant is obtained may be permissible if certain circumstances exist. Illinois v. McArthur, 531 U.S. 326, 121 S. Ct. 946 (2001). In McArthur, the defendant's wife asked the police to accompany her to the residence she shared with the defendant in order for her to remove her belongings. After the defendant's wife came out of the house after removing her property, she told one of the officers that he should check the house because the defendant had "dope" inside. The officer asked the defendant for permission to search the house, and the defendant denied to consent. The officer dispatched another officer to obtain a warrant. The officer who remained behind told the defendant, who was on the porch, that he could not reenter the home without an officer present. The defendant was allowed to go inside to make telephone calls and retrieve cigarettes, and while he did so, an officer stood in the doorway. The search warrant arrived and was executed, and the defendant moved to suppress the marijuana and drug paraphernalia recovered on the basis that the seizure was not permissible under the Fourth Amendment. Id. at 328-29, 121 S. Ct. at 948-49. The Supreme Court said that the situation presented a "plausible claim" of exigent circumstances and called for a balancing of privacy concerns with law enforcement interests to determine whether the intrusion had been reasonable. Id. at 331, 121 S. Ct. at 950. In balancing those concerns, the Court looked to four factors: (1) probable cause to believe the home contained evidence of a crime, (2) "good reason" to believe the defendant, unless restrained, would

destroy the evidence, (3) reasonable efforts made to reconcile the needs of law enforcement with the demands of personal privacy, and (4) a restraint imposed for a limited period of time. Id. at 332-33, 121 S. Ct. at 950-51. Upon consideration, the Court held that the temporary restraint was a reasonable seizure that was necessary to preserve evidence. Id. at 333, 121 S. Ct. at 951.

In the present case, the record reflects that the officers received information from the victim which provided probable cause for issuance of a search warrant of the defendant's home. The victim, a minor child and middle school student, was interviewed by officers who arrived at her school at 2:00 or 2:15 p.m., and she was then taken to the police department for further questioning around the time school was dismissing. The officers had "good reason" to believe the defendant would destroy evidence in his home. The victim expressed her fear that the defendant would destroy evidence and retaliate against her if he learned about the investigation. The authorities were concerned that the defendant would destroy evidence if he learned through the Department of Children's Services that an investigation was underway. The victim did not ride the school bus to the defendant's mother's house that day because she went to the police department with officers and a Department of Children's Services employee. The defendant and his wife went to the defendant's mother's house at 3:25 or 3:30 p.m. to pick up one of the victim's brothers who had ridden the bus. At this point, the defendant and his wife were on their way to their home, although the defendant's mother alerted them to the police presence there. The police balanced privacy concerns with the needs of law enforcement. When the defendant arrived at home, the officers restricted his access until they could execute the search warrant. They also restricted the access of the defendant's family members but allowed limited access for things such as allowing the defendant's mother-in-law to obtain a bottle for a child. The restraint was imposed for a limited period of time. Although there was evidence that the process took as long as five hours, the evidence reflects that the police were corroborating information from their initial interview with the victim and obtaining the search warrant during this time. Further, the defendant was not restrained from his home for that entire period of time. The record reflects that he arrived at his residence sometime after being at his mother's house at 3:25 p.m. and that the search warrant was executed at 8:00 p.m. Nothing suggests that the brief time period was greater than that needed for diligent officers to complete these tasks. We conclude that the trial court properly denied the motion to suppress.

III

The defendant claims the trial court erred in excluding evidence of prior false sexual abuse allegations made by the victim against the victim's mother's former boyfriend. The defendant argues that the trial court erred in denying him the opportunity to cross-examine the victim about the prior allegations and in excluding records of the investigation of that claim. He also argues that the trial court erred in excluding police, Department of Human Services, and medical records relative to this incident.

The court ruled before the trial that the defense could not question the victim about a false allegation she made when she was four or five years old that her mother's boyfriend had sexually abused her. The defendant argued that the evidence was relevant to the victim's credibility as well

as to her motivation to lie in the present case in order to be returned to her mother's custody. The defense claimed that the victim was removed from her mother's custody because of the allegations. The state contended that the defendant was given custody of the victim "because the mother was beaten to an inch of her life by this live-in boyfriend . . . in front of the kids. The mother . . . couldn't care for the kids and signed them over and said daddy could take them." The court found, "First of all, it was old; and second of all, the child was so young. So it's just too far removed from what we're doing." During an offer of proof at trial, the victim acknowledged that she had made a prior allegation of sexual abuse against a man other than the defendant. She admitted that the allegation had been a "lie" and claimed, "My parents told me to say that." She said that she did not want to get into trouble with her parents and that her parents did not tell her that her actions were wrong. She said she was removed from her mother's custody as a result. She said, however, that her allegations against the defendant were true.

The defendant makes various arguments of admissibility under Tennessee Rules of Evidence 404, 412, and 608. In addition, he claims that under the Confrontation Clause, the trial court's failure to allow him to cross-examine the victim concerning the victim's prior false allegation violated his right to confront his accuser as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

We note that the defendant's constitutional right to confront the witnesses against him includes the right to conduct meaningful cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998 (1987); State v. Brown, 29 S.W.3d 427, 431 (Tenn. 2000); State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992). Denial of the defendant's right to effective cross-examination is "'constitutional error of the first magnitude'" and may violate the defendant's right to a fair trial. State v. Hill, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111 (1974)). "The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the sound discretion of the trial court." State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); see Coffee v. State, 216 S.W.2d 702, 703 (Tenn. 1948). Furthermore, "a defendant's right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or marginally relevant interrogation." State v. Reid, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994). This court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. Dishman, 915 S.W.2d at 463; see State v. Fowler, 373 S.W.2d 460, 466 (Tenn. 1963).

A. Cross-Examination of Victim

The defendant claims that the evidence was not barred by Tennessee Rule of Evidence 412 and that it was admissible for witness impeachment under Rule 608(b). He argues that he was denied his right under the Confrontation Clause to conduct a full and complete cross-examination of the victim and that the error was not harmless beyond a reasonable doubt.

Generally, Rule 412 prohibits evidence of specific instances of a sexual assault victim's sexual behavior. Tenn. R. Evid. 412(c).[1] Sexual behavior is "sexual activity of the alleged victim other than the sexual act at issue in the case." Tenn. R. Evid. 412(a). "This broad definition 'deals with sexual intercourse as well as every other variety of sexual expression.'" State v. Sheline, 955 S.W.2d 42, 47 n.6 (Tenn. 1997) (quoting Neil P. Cohen, et al., Tennessee Law of Evidence § 412.2, at 241 (3d ed. 1995) (considering the victim's kissing another person on the evening of the offense under Rule 412). That said, however, this court has said that a victim's prior false rape accusation is not sexual behavior within the prohibition of Rule 412. State v. Wyrick, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001). We agree with the defendant that Rule 412 did not bar this evidence.

Next, we consider the defendant's argument that the evidence was not properly excluded under Rule 608(b). Rule 608 provides that conduct involving dishonesty may be inquired into on cross-examination of a witness if certain conditions are met. See Tenn. R. Evid. 608. Rule 608(b)(1) provides,

> (b) Specific Instances of Conduct.– Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or

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[1] Evidence of specific instances of a victim's sexual behavior can be admitted if the defendant follows the prescribed procedures in subsection (d) and if the evidence is:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

Tenn. R. Evid. 412(c).

> untruthfulness . . . . The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:
>
> (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry.

The rule also provides that the conduct generally must have occurred within ten years "before commencement of the . . . prosecution" and that an accused in a criminal prosecution is entitled to reasonable written notice of the state's intent to impeach him prior to trial, and the court must rule whether the impeachment will be allowed prior to trial, or at least prior to the accused's testimony. Tenn. R. Evid. 608(b)(2), (3). The rule also provides that evidence of specific incidents of conduct which occurred when the witness was a juvenile is generally inadmissible. Tenn. R. Evid. 608(c). However, such evidence is admissible if the witness is not the defendant in a criminal case and "if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission of the evidence is necessary for a fair determination . . . in a criminal proceeding." Id.

The trial court focused on the time which had passed since the allegation and the victim's young age. The rule provides,

> The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs it prejudicial effect . . . .

Tenn. R. Evid. 608(b)(2).

Upon review, we hold that the trial court erred in excluding this evidence. Generally, a prior false report of sexual assault is probative of the issue of a sexual assault victim's credibility. See Wyrick, 62 S.W.3d at 780. The victim admitted the conduct in question, thereby establishing a reasonable factual basis for the prior conduct. The time period since the prior false report is not precisely defined by the record, although it appears to have arisen in 1995, which was within ten years of the commencement of the prosecution. Although the victim's prior conduct occurred when she was a juvenile and evidence of it was therefore generally inadmissible under Rule 608(c), it was directly probative of the victim's truthfulness and would be admissible to attack the credibility of an adult. We hold that the evidence qualified as "necessary for a fair determination," and therefore should have been admitted under Rule 608.

The question which remains is whether the defendant was harmed by the exclusion of this evidence. When a defendant's fundamental constitutional right to cross-examine a witness against him for bias has been unreasonably restricted, the appellate court must determine whether the error was harmless beyond a reasonable doubt. See, e.g., State v. Rice, 184 S.W.3d 646, 670 (Tenn. 2006) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)). In doing so, the court may consider factors such as "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Rice, 184 S.W.3d at 671 (citing Van Arsdall, 475 U.S. at 684).

In the present case, the victim's testimony was a key component of the state's proof. Her testimony was strongly corroborated by the photographs also in evidence. The defendant was not restricted in his ability to cross-examine the victim about the details of the offenses. He was allowed to cross-examine the victim about her preference to live with her mother rather than the defendant and about the fact that she was able to return to her mother's custody after she made the allegations against the defendant. He was allowed to present other proof of the victim's motive to make a false allegation in order to be returned to her mother's custody. The jury also had before it the defendant's statement that the underwear in one of the photographs was his, notwithstanding his claim that the photograph did not depict him having sexual intercourse with the victim. Upon consideration of the strong proof of the defendant's guilt, we hold that the error in limiting cross-examination of the victim was harmless beyond a reasonable doubt. See, e.g., Delk v. State, 590 S.W.3d 435, 442 (Tenn. 1979) ("[T]he line between harmless and prejudicial error is in direct proportion to the degree of the margin by which the proof exceeds the standard required to convict, beyond a reasonable doubt.").

B. Extrinsic Evidence of Victim's Prior Allegations

Next, we consider the defendant's claim that the trial court erred in excluding the law enforcement, DHS, and medical records of the prior allegation. The defendant argues that the records were admissible to demonstrate the victim's motive in accusing the defendant of a crime.

The defendant employs a Rule 404(b) analysis, claiming that the evidence should have been admitted under Rule 404(b) to show that the victim's motive in accusing her father of rape was to obtain a change of custody to her mother's care. Tennessee Rule of Evidence 404(b) prohibits the introduction of evidence of other crimes or acts, except when the evidence of other acts is relevant to a litigated issue, such as identity, intent, or motive, and its probative value is not outweighed by the danger of unfair prejudice. The defendant cites State v. Daniel E. Pottebaum, Sr., No. M2004-02733-CCA-R3-CD, Davidson County (Tenn. Crim. App. May 5, 2006), a case which relied on State v. Wyrick, 62 S.W.3d 751 (Tenn. Crim. App. 2001), for analysis of the admissibility of a sexual abuse victim's prior false accusation of a third person under Rule 404(b). Our supreme court, however, has ruled that Rule 404(b) is limited to such evidence relative to the other crimes or acts of the defendant. State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002); see State v. DuBose, 953

S.W.2d 649, 653 (Tenn. 1997) ("Evidence of crimes, wrongs or acts, if relevant, are not excluded by Rule 404(b) if they were committed by a person other than the accused and are only conditionally excluded if committed by the accused."). Further, Wyrick's Rule 404(b) analysis was prompted by the defendant's having raised, for the first time on appeal, an argument that the evidence was admissible under Rule 404(b), an argument which the court rejected. See Wyrick, 62 S.W.3d at 777-78. In Daniel E. Pottebaum, Sr., the court concluded that Wyrick's application of Rule 404(b) remained viable, notwithstanding Stevens. Daniel E. Pottebaum, Sr., slip op. at 6, n.4. In part, the Daniel E. Pottebaum, Sr. court relied on the post-Stevens opinion in State v. David Gene Hooper, No. E2004-01053-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Aug. 16, 2005), app. denied (Tenn. Dec. 19, 2005). However, the court's commentary on Rule 404(b) in David Gene Hooper was dicta. See David Gene Hooper, slip op. at 10. As the author of the court's opinions in Wyrick and David Gene Hooper, this author concludes that those opinions simply overlooked Stevens and DuBose regarding Rule 404(b) not applying to witnesses other than the defendant.

In the present case, we adhere to our supreme court's dictates in Stevens. We do so because Rule 404(b) is a rule of exclusion. See, e.g., State v. Jones, 15 S.W.3d 880, 894 (Tenn. Crim. App. 1999). Its purpose is to exclude evidence which would be prejudicial to the defendant. Stevens, 78 S.W.3d at 837. If evidence which is prejudicial to the defendant is not in question, the more permissive standards of the other Rules of Evidence apply. See Stevens, 78 S.W.3d at 837 (citing DuBose for proposition that "[e]vidence of crimes, wrongs or acts, if relevant, [is] not excluded by Rule 404(b) if [the acts] were committed by a person other than the accused"); see also Tenn. R. Evid. 401.

The defendant claims that the victim was removed from her mother's home as a result of the prior allegation, and that by raising the present allegation, the victim sought another custody change. The evidence of record reflects that the victim's admitted motive in making the first allegation was to avoid displeasing her parents. The state disputed that the prior allegation was the cause of the prior change of custody, although the victim testified that it was. It was not disputed that the victim made a prior allegation of sexual abuse against a third party, that the allegation was false, or that the victim strongly desired to return to her mother's custody when she made the current allegation against the defendant. The defendant sought to introduce proof of these facts via extrinsic evidence, specifically the records of law enforcement, DHS, and medical providers. Rule 608(b) prohibits proof via extrinsic evidence of specific instances of a witness's conduct when offered to attack or support the witness's character for truthfulness. Specific instances of conduct may be the subject of cross-examination inquiry, as has been discussed above. See Tenn. R. Evid. 608(b). The trial court did not abuse its discretion in ruling that the defendant could not present extrinsic evidence of the victim's prior false accusation.

IV

The defendant contends the trial court erred in excluding evidence of the victim's mental health issues, treatment, and medication. He argues that the court should have allowed him to cross-

examine her on this topic. He also argues that the court erroneously prohibited him from subpoenaing the victim's therapist.

Before trial, the court allowed the defendant to examine the victim's psychological records, which detailed numerous counseling sessions. The court denied a defense motion seeking an interview with the victim's mental health treatment provider. The parties stipulated in an agreed order that if the defendant subpoenaed the provider, the state would move to quash the subpoena, and the court stated in the agreed order that it would grant the motion to quash. At trial, the defense sponsored an offer of proof in which the victim testified that she had been diagnosed with "ADHD" and depression, that she had attended mental health counseling while she was living with the defendant, and that she took medication while living with the defendant. She said that she "hated" taking her medication and that her mother had not made her take it since she had returned to her mother's custody. She said that she discussed with her counselor her desire to return to her mother's custody and that she did not tell her counselor about her father's sexual abuse because she would get in trouble with her parents.

A. Cross-Examination of Victim

The defendant claims on appeal that the trial court erred in ruling that he could not cross-examine the victim about her mental health treatment, medication, statements to her counselor that she wanted to live with her mother, and failure to report to her counselor that the defendant had sexually abused her. The defendant argues generally that his confrontation rights supersede any mental health provider-patient privilege which may apply to these records. He has not, however, explained how this cross-examination was relevant and essential to his defense. We hold that this evidence was not probative of a material issue and was properly excluded.

B. Motion to Interview Counselor and Trial Subpoena of Counselor

The defendant also complains that the trial court erred in denying his motion to be allowed to interview the victim's mental health treatment provider and in ruling that it would quash a defense trial subpoena of the mental health provider. The defendant has not cited any authority which compels the result he desires. He claims, without explanation, that the court's rulings were error under State v. Carter, 682 S.W.2d 224, 227 (Tenn. Crim. App. 1984). We are not persuaded by the defendant's reference to Carter. In Carter, the court addressed production of records of a psychologist whom the victim consulted after the sexual assault on trial. The court noted the distinction between records of state-funded mental health services, which are under the state's control for purposes of pretrial discovery materials and subject to disclosure under Tennessee Rule of Criminal Procedure 16 regarding pretrial discovery, and records of privately funded mental health services. Id. at 226-27. The victim in Carter consulted a private psychologist. The court noted that the psychologist was willing to comply with a subpoena for his records and held that production of the records was not barred by the statutes protecting privileged communication. The court held on the facts of the case that the defendant had subpoena powers available to him to obtain the psychologist's records. Id. at 227 (citing T.C.A. § 40-17-105; Tenn. R. Crim. P. 17). However,

Carter did not address the defendant's ability to compel a pretrial interview with the psychologist or a trial subpoena for the psychologist's testimony. Id. at 226-27. The defendant in the present case received the victim's mental health treatment records. Nothing in Carter compels us to hold the trial court in error in denying the defendant's request to be allowed to interview the victim's mental health counselor.

We turn to the defendant's claim that the trial court erred in ruling in the agreed order that it would have granted a motion from the state to quash a defense trial subpoena of the victim's counselor.

The defendant has made no argument on appeal of how the counselor's testimony would have been material to his defense. See Bacon v. State, 19 Tenn. 268, 273, 385 S.W.2d 107, 109 (1964) (holding that trial court may prevent abuse of process and that compulsory process is required if witness "is or probably will be a material one"); State v. Smith, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982) ("the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible"); State v. Womack, 591 S.W.2d 437, 443 (Tenn. Crim. App. 1979) (reciting rule that trial court may abate subpoenas of witnesses whose testimony would be immaterial). A showing that the counselor's testimony was material to the defendant's case is necessary before this court may grant relief from any action of the trial court. Because there has been none, the defendant is not entitled to relief.

V

The defendant claims the trial court erred in allowing the state to introduce the index proof containing explicit photos, including several of an unidentified male's penis and another of female genitalia other than the photographs depicting the victim's genitalia. The defendant also argues that the trial court erred in allowing the state to connect the defendant to the photographs through lay opinion testimony.

The state introduced the index proof during its rebuttal proof. In ruling that the index proof was admissible, the court found "the inference has clearly been raised that [the victim] took the camera and that she did something with that on Mother's Day in order to either set this man up or, you know – well, set him up. I'll stop there. . . . I think that it's probative, and I'm going to allow it." The state then introduced the index proof through the testimony of Detective Hardin, who said that he was familiar with the victim's mother and that he did not see the victim's mother in any of the photographs depicted on the index proof. The state did not question the witness about the photographs of a penis on the index proof. Rather, the defendant inquired on cross-examination of Detective Hardin about the photographs. The record reflects the following:

> Q. Detective Hardin, this roll of film had the baby picture first, which is just what Mr. Mooneyhan told you; correct?
>
> A. Yes.

Q. And then you have the pictures y'all have introduced as Exhibits 1 and 2, and then there are six other photographs there of a male penis; right?

A. After some unexposed frames, yes, sir.

Q. And then there's pictures of Cindy Mooneyhan's place of work or going away party or break room at work; right?

A. Yes.

Q. You have no knowledge other than that they were on this roll of film that these pictures here are Stacy Mooneyhan or any other person, do you?

A. (Witness makes no verbal response.)

THE COURT: Just answer the question.

THE WITNESS: I don't want my testimony to cause any sort of error in the court, but that's not the only time I've seen the defendant's genitals.

BY [DEFENSE COUNSEL]:

Q. Oh, okay. So you're – are you introducing identification proof? You're not a doctor, are you?

A. No, sir, I'm not.

Q. There's not been anything presented in this case regarding identification of the defendant's genitals?

A. No, sir.

Q. You're not qualified as an expert to make any such identification, are you?

A. No, sir. You simply asked me if I knew if that were his or not.

Q. And you don't. You don't have any evidence other than what's on this camera, do you? You're presuming that?

A. I'm not presuming anything, sir.

There was no defense motion to strike this testimony.

A. Admissibility of Index Proof

The defendant argues that this evidence was irrelevant and was unfairly prejudicial and subject to exclusion under Tennessee Rule of Evidence 403. The decision to admit a photograph into evidence is within the discretion of the trial court and will only be reversed upon a clear showing of an abuse of discretion. State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Tennessee Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." "A photograph is admissible if it is relevant to an issue in dispute and if its probative value is not outweighed by its prejudicial effect." State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998); see also State v. Evans, 838 S.W.2d 185, 193 (Tenn. 1992).

The trial court did not abuse its discretion in ruling that the index proof was relevant to rebut the testimony of defense witnesses Kathy Gregory that the victim had used the camera on Mother's Day. The victim's access to and use of the camera was relevant to the question of whether the victim had had the opportunity to stage the photograph which she claimed depicted the defendant raping her and the photograph which she claimed the defendant took of her while she was unclothed. We acknowledge that some of the photographs on the index proof are graphic. However, the trial court admitted the index proof containing small, thumbnail prints, not enlarged prints of the graphic photographs. The jury had before it other graphic evidence due to the nature of the case itself, and these additional photographs were not so graphic beyond the evidence that was already before the court as to be unfairly prejudicial. The trial court did not abuse its discretion in admitting the index proof as rebuttal evidence.

B. Admissibility of Testimony

The defendant also argues that after the index proof was admitted, "the state then impermissibly sought to connect [the index proof] to the defendant by means of lay opinion testimony [of Detective Hardin]." We note first of all that the defendant has mischaracterized what occurred at trial. As reflected in the quoted material above, the defense, not the state, elicited the testimony in question. Because the defendant elicited this testimony, he cannot be heard to complain of its admissibility. See, e.g., State v. Robinson, 146 S.W.3d 469, 493 (Tenn. 2004) (holding that defendant could not complain that testimony was inadmissible hearsay when he elicited it). Second, the defendant did not move to strike the testimony. See Tenn. R. Evid. 103(a)(1) (requiring a timely objection or motion to strike evidence); Tenn. R. App. P. 36(a) (requiring party to take whatever action is reasonably necessary to prevent or nullify harmful effect of error).

VI

Finally, the defendant challenges the propriety of his sentences. He claims error in the enhancement of his sentences, contrary to Blakely v. Washington, 542 U.S. 296 (2004) and United States v. Booker, 543 U.S. 220 (2005). He also challenges the propriety of consecutive sentencing.

When a defendant appeals the length or manner of service of a sentence imposed by the trial court, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). However, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sent'g Comm'n Cmts. This means if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168.

The trial court imposed the following sentences at the conclusion of the hearing:

> Count 1 - Rape of a Child, Class A felony
> Twenty-three years, Department of Correction as a Standard Offender, Child Rapist at 100 percent, concurrent with Count 2, consecutive with Counts 3, 6, and 7
>
> Count 2 - Incest, Class C felony
> Four years, Department of Correction as a Standard Offender, concurrent with Count 1, consecutive with Counts 3, 6, and 7
>
> Count 3 - Aggravated Sexual Battery, Class B felony
> Ten years, Department of Correction as a Standard Offender with Violent 100 percent designation, concurrent with Counts 6 and 7, consecutive with Counts 1 and 2
>
> Count 6 - Especially Aggravated Sexual Exploitation of a Minor, Class B felony

Twelve years, Department of Correction as a Standard Offender, concurrent with Counts 3 and 7, consecutive with Counts 1 and 2

Count 7 - Especially Aggravated Sexual Exploitation of a Minor, Class B felony
Twelve years, Department of Correction as a Standard Offender, concurrent with Counts 3 and 6, consecutive with Counts 1 and 2

The record reflects that the defendant was sentenced for crimes which occurred before June 7, 2005, but that his sentencing was after that date. It also reflects that the trial court applied the sentencing laws as they exist after the amendments which took effect on June 7, 2005. In enacting the 2005 amendments, the legislature provided that defendants sentenced on or after June 7, 2005, for crimes committed before that date but after July 1, 1982, "may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections." T.C.A. § 40-35-210, Compiler's Notes. The record before us does not contain a written waiver. Thus, we cannot discern from the record whether the trial court properly applied the new law.

We note, as well, that problems exist with the sentences imposed whether the old law or new law was applicable. If the prior law was applied to the defendant's sentencing, the enhancement factors applied by the trial court are problematic based upon the United States Supreme Court's recent ruling in Cunningham v. California, 549 U.S. __, 127 S. Ct. 856 (2007). In Cunningham, the Court held unconstitutional a sentencing law which allowed the trial court to enhance a defendant's sentence after finding by a preponderance of the evidence that statutory enhancement factors existed. Id. at ___, 127 S. Ct. at 868. The Tennessee Supreme Court has held that, in accord with Cunningham, the Sentencing Reform Act of 1989, prior to its June 7, 2005 amendments, failed to comply with the Sixth Amendment by allowing sentence enhancement based upon judicially determined facts other than prior criminal record. State v. Gomez, ___ S.W.3d ___ (Tenn. 2007).

On the other hand, if the law that came into effect on June 7, 2005, was applied to the defendant's sentences, we note shortcomings in the trial court's findings relative to enhancement factors. The court found that each of the defendant's sentences should be enhanced because the victim "was particularly vulnerable because of age or physical or mental disability[.]" T.C.A. § 40-35-114(4). The trial court made no findings to support a conclusion that the victim was particularly vulnerable due to her age or a disability. See, e.g., State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995) (holding that victim's age of twelve years was not sufficient alone to support application of enhancement factor and that there must be proof of victim's particular vulnerability). The court also found that the defendant's sentences for aggravated sexual battery and two counts of especially aggravated sexual exploitation of a minor should be enhanced based upon the defendant's commission of the offense to gratify his desire for pleasure or excitement. However, the court did not state the facts upon which it based this finding. The trial court also enhanced the defendant's sentences for rape of a child, aggravated sexual battery, and two counts of especially aggravated sexual exploitation of a minor based upon the enhancement factor that "[t]he defendant abused a position of public or private trust, or used a professional license in a manner that

significantly facilitated the commission or the fulfillment of the offense[.]" T.C.A. § 40-35-114(14). While this factor may be appropriately applied in cases where the defendant perpetrates a crime against his child who is in his custody, the court did not state the basis upon which this factor was applied.

Finally, we note that the trial court did not make findings relative to consecutive sentencing. Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the court may order sentences to run consecutively if it finds by a preponderance of the evidence that certain facts exist. Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court "specifically recite the reasons" behind its imposition of a consecutive sentence. See State v. Donnie Thompson, No. M2002-01499-CCA-R3-CD, Maury County, slip op. at 5 (Tenn. Crim. App. Mar. 3, 2003) (reversing the trial court's imposition of consecutive sentencing because it failed to make a finding under Tennessee Code Annotated section 40-35-115(b) and the record did not support a conclusion that the defendant met the consecutive sentencing prerequisites). This is an additional reason supporting remand to the trial court for resentencing.

In consideration of the foregoing, we affirm the defendant's convictions. However, we must remand this case to the trial court with instructions that it resentence the defendant under the sentencing act as it existed prior to June 7, 2005, or alternatively, under the present law if the defendant executed a written waiver allowing sentencing under the law effective June 7, 2005.

_____

JOSEPH M. TIPTON, PRESIDING JUDGE